

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
BRIEF**

74-2107

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GEORGE RIOS, EUGENE C. JENKINS, ERIC O. LEWIS
and VYLIE B. RUTLEDGE,
Plaintiffs-Appellees,

-and-

JOHN GUNTHER, CHARLES T. FARRELL, FRANK MONTANARO,
HUGH DONNEGAN, ROBERT McMILLION, MICHAEL LONIGRO
and ANTHONY BORELLI, each of them individually and
on behalf of all other persons, members of the Metal
Trades Branch or "B" Local of Enterprise Association,
Local 638, and having four years' or more experience
as steamfitters or in employment reasonably related
or similar to steamfitting work, similarly situated,

Applicants to Intervene-Appellants,

-against-

ENTERPRISE ASSOCIATION STEAMFITTERS LOCAL UNION
#638 of U.A.: MECHANICAL CONTRACTORS ASSOCIATION OF
NEW YORK, INC. and the JOINT STEAMFITTING APPRENTICE-
SHIP COMMITTEE OF THE STEAMFITTERS' INDUSTRY EDUCA-
TIONAL FUND,

Defendants-Appellees.

UNITED STATES OF AMERICA (Equal Employment Oppor-
tunity Commission),

Plaintiff-Appellee.

-and-

JOHN GUNTHER, et al., etc.,

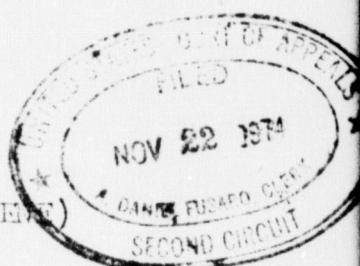
Applicants to Intervene-Appellants,

-against-

ENTERPRISE ASSOCIATION STEAMFITTERS LOCAL UNION
#638 of U.A., et al.,

Defendants-Appellees.

BRIEF OF APPELLANTS (APPLICANTS TO INTERVENE)



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638 OF U.A., et al.,

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UNITED STATES OF AMERICA (E.E.O.C.)

Plaintiff-Appellee,

-and-

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-against-

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638 of U.A., et al.,

Defendants-Appellees.

Relevant Docket Entries

Feb. 26, 1971 Filed Complaint and issued summons

June 21, 1973, Filed Opinion and Order and Judgment

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Plaintiffs-Appellees,

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of U.A., et al.,

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UNITED STATES OF AMERICA (Equal Employment
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Plaintiff-Appellee,

-and-

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BRIEF OF APPELLANTS (APPLICANTS TO INTERVENE)

Preliminary Statement

The decision appealed from, decided by the Hon. Dudley B. Bonsal, of the District Court for the Southern District of New York, has not been reported.

Issue Presented

Whether a person whose rights were created by a post-judgment order and who, prior to judgment, had no standing or jurisdictional basis to intervene, may intervene after the judgment to protect and vindicate those newly-created rights.

Rule Involved

Paragraph (a) of Rule 24, Federal Rules of Civil Procedure, provides as follows:

"(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

Statement of the Case

For many years, the defendant Enterprise Association (or "Union") has excluded from membership in its "A" local -- the organization that represents steamfitters in New York and Long Island* -- large numbers of working steamfitters. Rather obviously, its purpose in doing so has been to exploit non-members of the "A" local for the benefit of members: allowing the non-members to work only when work is plentiful and requiring that they be replaced by "A" members whenever work is scarce. Indeed, the Enterprise Association has repeatedly asserted its desire to protect the employment opportunities of "A" members by limiting the number of steamfitters accepted into membership in the "A" local, or (in plainer language) it has asserted its intention to continue its unlawful discrimination in employment against non-members of the "A" local.**

This suit was initiated by and at the behest of members of one class of persons who were among those excluded from membership

* There is also a "B" local, or Metal Trades Branch, which has an entirely different (i.e., non-steamfitting) jurisdiction. However, many steamfitters, denied membership in the "A" local, have been allowed and/or required to join the "B" local, and pay dues to it, although they do not work in the "B" local's jurisdiction.

** Unlawful, because the Union is the exclusive bargaining representative for all steamfitters, members and non-members, and owes to all of them a duty to refrain from hostile discrimination against any segment of the employees it represents. Vaca v. Sipes, 386 U.S. 171, 177 (1967); Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192 (1944).

in the "A" Local, namely those who are either non-white or Spanish-surnamed. Because they could show that their exclusion from membership in the Union was at least partly caused by, or intertwined with, racial or national discrimination, suit was brought by ~~and~~ on their behalf under Title VII of the Civil Rights Act (in two actions, now consolidated). Suit was initiated February 26, 1971; Judgment was entered June 21, 1973. The Court directed an end to racial discrimination, and directed changes to that effect in the apprenticeship program ~~and~~ through direct admission of qualified non-white and Spanish-surnamed steamfitters into "A" membership. The Court retained jurisdiction, and still retains it.

The Appellants here, Applicants to Intervene below, are members of a different, though related, class of persons also excluded from membership in the "A" Local. Some have been excluded for many years: Appellant McMillion has been working in the steamfitting trade in New York City for more than 21 years, and has made repeated efforts to join the "A" Local, but has been refused and consigned to "B" Local membership instead, with its concomitant discrimination in employment. There are about 500 members of this (second) class of excluded persons, who are used in effect as a "cushion" in ensuring employment for "A" members.

The difference between the class represented by Appellants and that represented by the original plaintiffs is that the latter are entitled to bring suit under Title VII of the Civil Rights Act -- while the former, since their exclusion from membership does not

derive (or, more accurately, is not alleged to derive) from racial or national discrimination, are not so entitled. Hence from the initiation of these suits up to Judgment, and thereafter, the Appellants did not move to intervene in it. As might be expected, many of them sympathized with the plaintiffs, who, like them, had suffered exclusion from the "A" Local and all the economic injury that results from such exclusion (29a-30a). But they were compelled to be bystanders.

However, after Judgment, the District Court created certain rights in the class of persons represented by Applicants, in the course of taking charge of the entire subject-matter of admission to membership in the Union. It provided, first, for a "transitory" period, in which applications for membership would be limited to non-white or Spanish-surnamed persons; that "transitory period" ultimately ended December 31, 1973; secondly, the District Court provided that upon expiration of the "transitory period," not only non-white or Spanish-surnamed persons, but also "all other persons" who have made proper request therefor should be entitled to apply and be tested and processed for "A" Local membership in the same manner as provided for non-whites. This new right was first created by the District Court's Order of November 15/20, 1973; it was made permanent in the Affirmative Action Plan and the order of March 29, 1974 putting the latter into effect (38a-39a, 40a-41a).

Thus, more than six months after Judgment (i.e., at the close

the "transitory period" on December 31, 1973), the Applicants, and other persons similarly situated -- steamfitters who, though neither non-white nor Spanish-surnamed, had been and still were excluded from membership in the "A" Local -- had rights in court that they had not previously possessed. For just as the November 15/20, 1973 Order had given to such "other persons" the right to be processed for membership in the "A" Local (38a-39a), so the Affirmative Action Plan guaranteed them the same right (41a).

The Applicants, each of them, either had applied for membership in the "A" Local in the manner prescribed by the two orders, or did so after the November 15/20, 1973 order was handed down (17a-18a). They reasonably expected their rights to be respected, or at least that present parties, or the Administrator, or the court sua sponte, would enforce the orders in regard to them. But in fact their rights were not respected and they could get no help from any of these sources (125a-127a; and see affidavit of Robert Graham, Record, Item #93, together with the Farrell affidavit).

Accordingly, early in April 1974, they moved to intervene in the action, on behalf of themselves and the entire class of persons they represent: roughly, all the excluded steamfitters not embraced within the class represented by plaintiffs. Shortly thereafter, because of retaliatory discharges from employment suffered by some of them, and because of continued exclusion, they moved to hold the defendant Union in contempt (122a-128a). In opposing

the motion, the defendant Union's Secretary-Treasurer, John J. Sheeran, made several clarifying admissions by affidavit. He stated that during the period in which the November 15/20, 1973 order was in effect (i.e., up to March 31, 1974), the Union had taken no action at all to process any of the "other persons" described in it: i.e., it had not processed nor sought to process any members of the class represented by Applicants, despite their rights under the order. Although giving as justification the continued testing of non-whites, he conceded in his affidavit that this had terminated January 9, 1974 and was only briefly resumed, on February 14 and 15, 1974, to take care of those who had missed the scheduled testing dates (33a-34a). Mr. Sheeran further stated that he did not even meet with the Administrator to consider implementation of the direct-admission features of the Affirmative Action Plan until April 22, 1974, or nearly a month after it had been approved and substantially after motion to intervene had been brought (34a).

The motion to intervene and the motion to hold in contempt (which also sought preliminary injunctive relief) were argued before the District Court, Hon. Dudley B. Bonsal. By memorandum of July 9, 1974, the motion to intervene was denied as untimely (3a-5a). By separate memorandum-endorsed the same day, the motion to hold in contempt was denied on the ground that intervention had been denied (149a).

The applicants appealed from denial of their motion to inter-

by filing Notice of Appeal on August 6, 1974.

Point I.

THE DISTRICT COURT ERRED IN REFUSING ON GROUNDS OF TIMELINESS TO ALLOW APPLICANTS TO INTERVENE AS OF RIGHT.

Prior to January 1, 1974, the Applicants to Intervene (Appellants here) had no basis for intervention in the actions below. They do not oppose the suit below; it is brought by and on behalf of fellow-steamfitters who, like the Applicants, have unfairly and discriminatorily been denied membership in the defendant Union, and who have been discriminated against in employment as a result. Nor do Applicants oppose the remedial orders issued by the District Court designed to end racial discrimination. Hence, prior to the entry of the post-judgment orders of November 15/20, 1973 and March 29, 1974 (add the effective date; as regards the rights given them by the first of these, namely January 1, 1974), they had no rights in the litigation on which to base an application for intervention. And not until it thereafter became apparent that their newly-created rights were not being protected by present parties were they able to learn that intervention was necessary to protect their interests.

Yet the District Court denied intervention on the ground that the motion for it was "untimely." It was untimely, said the Court, because "these Title VII actions have already gone to Judgment and

the Judgment has been affirmed by the Court of Appeals" (4a).

Or, in other words, the post-judgment nature of the motions renders them "untimely" even though they could not have been brought before judgment, or before entry of the post-judgment orders creating the rights for whose protection intervention was sought.

The key to the District Court's ruling is its erroneous assumption that post-judgment intervention is improper. The law has long been contrary.* Thus in Wolpe v. Poretsky, 144 F.2d 505, 508 (D.C.Cir. 1944), cert. den. 323 U.S. 777, the D.C. Circuit, in reversing on the ground that applicants should have been allowed to intervene as of right, declared that "Intervention may be allowed after a final decree where it is necessary to preserve some right which cannot otherwise be protected." More recently, the same Court has ruled that, in addition to the amount of time that has elapsed since the litigation began, "the court should also look to the related circumstances, including the purpose for which intervention is sought, the necessity for intervention as a means of preserving the applicants' rights, and the improbability of preju-

* The Supreme Court has recently re-emphasized this by its comment in NAACP v. New York, 413 U.S. 345, 368, 37 L.Ed.2d 648, 664, 93 S.Ct. 2591 (1973) that "... (d) appellants were free to renew their motion to intervene following the entry of summary judgment since the District Court was required, under § 4(a) of the Voting Rights Act, 42 U.S.C. § 1973b(a), to retain jurisdiction for five years after judgment...."

The undersigned is advised by counsel who participated in that litigation on behalf of the NAACP Legal Defense Fund that the NAACP applicants did renew their motion to intervene after the Supreme Court's decision and that it was granted. NAACP ultimately prevailed in the action and the determination, setting aside the summary judgment, was summarily affirmed by the Supreme Court, New York v. United States, no. 73-1371, 43 U.S.L.W. 3224.

dice to those already in the case." Hodgson v. United Mine Workers, 473 F.2d 118, 129 (D.C. Cir. 1972).

The Hodgson case is illustrative. There, the Secretary of Labor had brought suit against defendant Union under Title III of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. ^{ss} 401, et seq., challenging the Union's imposition of trusteeships over various of its districts. The case reached trial more than six years after it had been initiated. Trial was completed on July 22, 1971, and decision was reserved. On May 24, 1972, or ten months after trial was completed, the Court handed down its Opinion finding the trusteeships unlawful and requesting an appropriate order dissolving them. Thereafter, on June 5, 1972, the applicants, members of the Union, moved to intervene. Their motion was denied on June 20, 1972, on the grounds that it was untimely and that the Secretary's representation of applicants' interest was adequate.* Upon applicants' appeal, the Court of Appeals reversed, ruling that the union members were entitled to intervene as of right and that untimeliness, in such a situation, was no barrier.

The Court of Appeals ruled, in reversing denial of the

*A previous motion to intervene, made in January 1972, had also been denied as untimely, but because of lack of notice applicants (the same persons) allowed their time to appeal from that denial to lapse.

motion to intervene in Hodgson, supra, 473 F.2d at 129,

"To be sure, appellants' application was made after the action was tried, and some seven years after it was filed. But the proposed intervenors expressly disavowed any desire to reopen any previously-litigated question, and sought only to participate in the remedial, and if necessary the appellate, phases of the case. This limited goal does not appear to impose any untoward burden on the UMWA, the Secretary, or the Court. Timeliness presents no automatic barrier to intervention in post-judgment proceedings where substantial problems in formulating relief remain to be resolved.... It can hardly be gainsaid that appellants have rights which could be lost irretrievably were intervention not permitted at this time."

The decision of the Sixth Circuit's Court of Appeals in System Federation No. 91 v. Reed, 180 F.2d 991 (6th Cir. 1950), is also illustrative. In that case, some 28 machinist helpers employed by defendant Railroad and represented by, but not members of, the Machinists' Union had brought suit to enjoin the Railroad and the Union from discriminatorily demoting employees not members of the Union. The Railroad and Union thereafter consented to the entry of a declaratory judgment and injunctive decree, so ordering them. After the injunction went into effect -- i.e., after judgment and entry of the decree -- a machinist named Reed, who had not been an original plaintiff and who had been a member of the Union at the time of the earlier proceedings, withdrew from membership in the Union. Upon his doing so, the Railroad and the Union renegotiated the earlier agreement between them so as to provide that persons would be demoted from machinist to machinist helper not "with consideration being given them in seniority order" (as the

earlier agreement had required) but rather in reverse order of promotion. This affected Reed directly, since he had been promoted after some thirteen other machinist helpers who were junior to him in seniority. Under the earlier agreement they would have had to be demoted before him. Ten days after renegotiation, Reed was demoted to machinist helper, while the thirteen others were not. A few weeks later, the new, renegotiated agreement was rescinded but Reed was not re-promoted. The demotion took place in January 1946, at which time the injunctive decree was already in force; Reed did not move to intervene until November 1946, eleven months later. His purpose in intervening was, of course, to secure for himself the benefits of the decree by citing the Union and Railroad for contempt of it. His motion was granted; upon his contempt motion the Railroad and Union were held in contempt; and upon their appeal the Court of Appeals affirmed. The Court of Appeals ruled that he was entitled to intervene as of right, in order to secure benefits for himself from the judgment and decree that had previously been entered.

The leading case in regard to timeliness of appeal is Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 17 L.Ed.2d 814, 87 S.Ct. 932 (1967), in which the Supreme Court reversed the denial of motions to intervene as of right that were made more than seven years after suit had been brought, long after trial and judgment, and after the Supreme Court had heard argument on and reversed the judgment and ordered the district court to fashion a divestiture decree. Suit had been brought by the United

States in 1957, challenging merger of the El Paso company with its major competitor in the western states, as in violation of Section 7 of the Clayton Act. From an adverse judgment, after trial, the United States appealed; the Supreme Court reversed and ordered divestiture of the competitor by El Paso, United States v. El Paso Nat. Gas Co., 376 U.S. 651, 12 L.Ed.2d 12, 84 S.Ct. 1044 (1964). Throughout all these proceedings, none of the three appellants in Cascade, supra, moved or petitioned to intervene.

Following the reversal the United States and El Paso sought to agree on a divestiture plan, conducting negotiations to this end from April 1964 to October 1964. They did not succeed. In October 1964, hearings were begun in District Court, with El Paso submitting testimony and exhibits in support of a plan proposed by it. After substantial hearings, negotiations for a proposed decree were recommenced. Finally, on May 24, 1965, public notice was given of a proposed decree agreed to by El Paso and the United States, providing for a 30-day period before consideration by the Court of its proposed entry. On June 24, 1965, a hearing was held and the decree was entered.

The three appellants made application to intervene during the course of these proceedings. Two of them -- the State of California and the Cascade company -- were among 20 applicants to intervene whose motions were formally denied on January 22, 1965, United States v. El Paso Nat. Gas Co., 37 F.R.D. 330 (D.Utah 1965). California claimed right to intervene on the ground that it had an

interest in maintaining competition within its borders; Cascade claimed a consumer interest, since it was a distributor in Oregon and Washington and its sole supplier of natural gas would be the New Company created by the divestiture plan. Both applications (along with the 18 others) were denied on, among other grounds, those of timeliness. Five months later, and 29 days after the public notice of the proposed decree had been given -- i.e., on June 22, 1965 -- the third of the subsequent appellants, Southern California Edison, filed a request or motion for intervention with the district court clerk. Its attorneys appeared in district court on June 24, 1965, at the hearing on adoption of the proposed decree, although as of that time their motion had not come before the Court. (See: Record on Appeal in Cascade, supra, Nos. 4, 5, and 24, Oct. Term 1966, at pp. 2089, 2092.) The decree was entered that day, June 24, 1965. Edison's motion to intervene was heard and denied on June 28, 1965. (Edison's interest in intervention was that as as a large industrial user of natural gas purchasing from El Paso sources it was desirous of maintaining competition.)

In denying the applications of California, Cascade and the 18 others (the latter did not appeal) in January 1965, the District Court cited, among other grounds, that of timeliness. It noted that the applications "come long after the trial and entry of the judgment, which was reversed by the Supreme court upon an opinion requiring 'divestiture without delay.' Every issue on the merits

between plaintiff and El Paso has been finally adjudicated. All that remains is to fashion a divestiture decree which complies with the mandate of the Supreme Court." United States v. El Paso Nat. Gas Co., supra 37 FRD at 331-332; therefore "The fact that each of the motions and applications before the Court was filed long after judgment was entered is itself a sufficient basis for denial." Ibid, at 333. As to Edison's subsequent application, which could not be heard until after entry of the decree and had not even been filed with the clerk until the 29th day of the 30-day waiting period, this consideration was, of course, even stronger. And the issue of timeliness was argued in the briefs of the parties, with particular reference to Edison's application.

Nevertheless, the Supreme Court, in Cascade, supra, ruled that all three appellants were entitled to intervene as of right, and that it was error to deny them intervention. No member of the Court thought there was any need to discuss the timeliness question. The Court reversed with directions to allow each appellant to intervene as of right, to vacate the divestiture order, and to have de novo hearings on the issue of divestiture, with a different district judge assigned to the case.

It is obviously the holding of the cases cited that intervention is not necessarily excluded as untimely because brought after judgment, or after appeal from judgment. What should be looked at are the considerations spelled out in Hodgson, supra: the purpose for which intervention is sought, the necessity for

intervention as a means of preserving the applicants' rights, and the improbability of prejudice to those already in the case.*

A review of those considerations here shows plainly that there is no ground for denying intervention as of right.

As to the purpose for which intervention is sought: the Applicants do not seek intervention in order to re-open any previously-litigated question. Far from wishing to challenge either the judgment itself or any of the post-judgment orders of the District Court, they seek to vindicate rights created by those post-judgment orders. They seek to secure, for themselves and for the class of persons they represent, the benefits that those orders conferred and intended to confer upon them. Indeed, Applicant Farrell, in

* The dispositions of the intervention applications in NAACP v. New York, supra, and in proceedings subsequent to that decision, are easily understood in the light of these considerations. There, New York's application for declaratory judgment was designed to let the 1972 elections proceed without requiring recourse to the cumbersome procedures that would be required if Section 4(a) of the Voting Rights Act of 1965, 42 U.S.C. § 1973b(a), were to apply. The United States had consented, as defendant, to entry of the summary judgment that was sought. The NAACP waited until April 7, 1972 to move for intervention; and even then its announced purpose was to remove any possible adverse effect that the judgment might have on a separate suit, simultaneously filed by it, under Section 5 of the Act, alleging that Assembly, Senate and Congressional districts in the three New York counties had been gerrymandered so as to deny the right to vote on account of race or color. The Supreme Court noted that the summary judgment would not foreclose NAACP's challenge to the State's redistricting plans on the claim of racial gerrymandering, and further noted that no applicant alleged an injury personal to him arising from the subject matter of the New York suit: namely, the matter of literacy tests. And it noted that the dates for filing nominating petitions in the primary elections were such that granting a motion to intervene at that time "possessed the potential for seriously disrupting the State's electoral process with the result that primary and general elections would then have been based on population figures ... more than ten years old." Ibid, 413 U.S. 368, 369, 37 L.Ed.2d 664.

his reply affidavit on the motion to intervene (30a) declared on behalf of the Applicants;

"We, Applicants to Intervene, do not oppose and have not opposed the efforts of plaintiffs and of this Court to end racial discrimination and to bring this Union into conformity with the law. We have no interest in excluding any workers in the steamfitting industry from membership in the Union, nor do we benefit from the racially-discriminatory, exclusionary, exploitive and elitist practices of the Union's incumbent officialdom. In fact, along with the members of the class represented by the Rios plaintiffs, we have been and continue to be victims of those practices."

Since Applicants accept the Court's rulings banning racial discrimination and directing remedial steps to end it, and since they seek only to vindicate rights created in them by those rulings, their intervention cannot prejudice the existing plaintiffs. Nor can it prejudice defendants. As the Supreme Court pointed out in Trbovich v. United Mine Workers, 404 U.S. 528, 536, 30 L.Ed.2d 686, 693, "The principal intrusion on internal union affairs has already been accomplished by the Government's institution of suit~~7~~.... Intervention in the suit ... will not subject the union to burdensome multiple litigation, nor will it compel the union to respond to a new and potentially groundless suit." Instead, as the Court pointed out at loc. cit., "Intervention by union members in a pending enforcement suit ... subjects the union to relatively little additional burden."

Finally: as to the necessity for intervention as a means of preserving the applicants' rights. No existing party represents or even presumes to represent the interests asserted by

the Applicants: neither the original private plaintiffs, whose complaint is grounded on racial and national discrimination, nor the Equal Employment Opportunity Commission, whose powers are similarly limited, nor the Union nor the employers. Only the Applicants, or similar applicants representing the same or a similarly described-class, by intervening and taking such proceedings as may achieve enforcement of the Court's orders relating to the rights of the class they represent, can and will protect those interests.

The Court of Appeals in Hodgson, supra, pointed out that the litigation there had entered its most critical phase after decision. The effectiveness with which the Court's directions were to be carried out was crucial. Hence it was essential that the applicants be entitled to intervene "in order to assure that their interest in effective dismantling of the unlawful trusteeships in their districts is safeguarded at this particularly crucial stage of the case." Ibid, 473 F.2d at 130.

* At the time motion to intervene was brought, the United States was a party-plaintiff in its own name and it urged upon the Court, in its memorandum, that it would represent the interests of the class represented by the Applicants. That such representation necessarily is or may be inadequate was made clear in Trbovich, supra, 404 U.S. at 538-539, 30 L.Ed.2d at 695. But even the colorable claim of representation made by the Government was eliminated subsequently when the EEOC replaced the United States as party-plaintiff. However valuable the interests which EEOC was established to protect, the interests of the class represented here by Applicants -- i.e., of workers oppressed by exclusion from the Union for reasons other than racial, national, religious, age or sex discrimination -- do not fall within its ambit.

Similarly, what remains at issue here is the effectiveness with which the Court's orders, providing for a testing procedure for all persons with experience in the steamfitting trade who make proper application to be tested, will be carried out. Only by allowing the employees interested in effective enforcement of those orders to be represented through intervention, and to be enabled to make such applications as may be necessary to secure effective enforcement, can the protection of employees' rights created by those orders be secured. Applicants are entitled to and should be entitled to intervene as of right in order to protect their rights at this particularly crucial stage of the case.

Point II.

APPELLANTS ARE ENTITLED TO INTERVENE AS OF RIGHT

An applicant is entitled, upon timely application, to intervene as of right under Rule 24(a) if (i) he claims an interest relating to the "property or transaction" which is the subject of the action, (ii) he is so situated that, "as a practical matter," the disposition "may" impair or impede his ability to protect that interest, and (iii) his interest may not be adequately represented by existing parties. The Applicants here meet the three tests clearly: under the District Court's post-judgment orders they can claim, and do claim, substantial interests in the "property or transaction" before the Court, i.e. in the matter of admission, and testing for admission, to membership in the Union; the failure of a party to seek enforcement of the Court's orders

relating to them plainly will "impede or impair" their ability to protect that interest, since the interest claimed cannot be protected at all except through enforcement of the Court's orders in this case. Finally, the possible inadequacy of existing representation by the United States -- the only existing party that even colorably could claim to represent Applicants' interest -- is demonstrated by the other responsibilities placed upon the Government in this type of case, responsibilities whose paramountcy has been demonstrated by the substitution of the EEOC as plaintiff for the Government. Compare: Trbovich v. United Mine Workers, supra, 404 U.S. at 538-539, 30 L.Ed.2d at 695.

These issues were argued at length, both orally and in writing, in the District Court. See especially: 6a-15a (Gunther affidavit), 28a-32a (Farrell affidavit), and Applicants' memoranda of law, Items ## 81 and 95 in the Record. The District Court, however, stopped in its consideration at the timeliness issue. Concluding that "untimeliness" disposed of the intervention motion, its consideration of the purpose for which Applicants sought intervention was plainly circumscribed -- to such a degree that, in the face of the clear statements of the Applicants, in affidavits, memoranda and oral argument as to why they desired intervention, the District Court could erroneously speculate: "It would appear that applicants to intervene feel that perhaps due to the Title VII actions and the Affirmative Action Plan, white members of the B Branch are being passed over by the Union in their desire to join the A Branch, in

favor of nonwhite applicants."

To the contrary, Applicants have repeatedly advised the Court that they have been denied membership in the A Branch for many years prior to the institution of the Title VII actions; that but for institution of those actions they would not only continue to be excluded but would be denied the rights that have been created for them by the Court's post-judgment orders. See especially: 7a-9a, 28a-30a. The District Court would create a De Funis case where none in fact exists: Applicants are not victims of "reverse discrimination," nor have they ever claimed to be. They are and long have been victims of unjust exclusion from membership in the Union which has the legal power and responsibility to represent them in collective bargaining, and of unlawful employment discrimination on the part of that bargaining representative. But competition with nonwhites is not part of the problem.

A word remains to be said about the nature of Applicants' interest in the property or transaction that is the subject of the judicial proceedings. The remedial proceedings of the Court below concern the "property or transaction" of applicants for membership in defendant Union. The District Court has taken possession of that "transaction" just as completely as, in a different type of case, it may take possession of a fund or a piece of material property in order to make plaintiffs (and others) whole. Applicants' interest in that property or transaction is every bit as real and unambiguous as any creditor's interest in a monetary fund; compare:

McDonald v. E.J. Lavino Co., 430 F.2d 1065 (5th Cir. 1970). It is directly analogous to the "transaction" of divestiture in Cascade Natural Gas Corp. v. El Paso Natural Gas Co., supra.

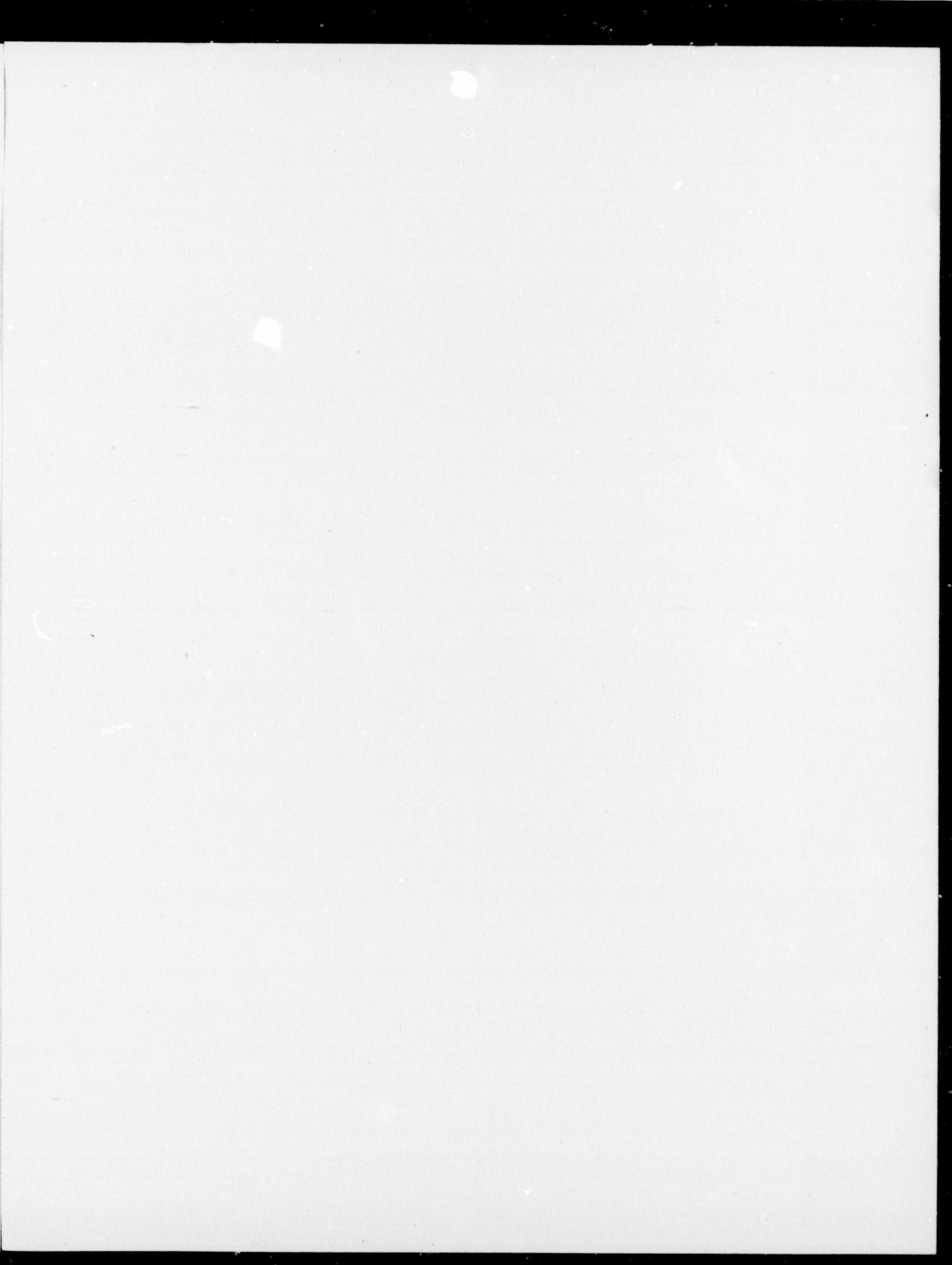
To deny the reality of the Applicants' interest in that transaction merely by pointing to the fact that Applicants were not so situated as to have instituted a Title VII action themselves is merely to liken their situation to that of applicants to intervene generally: it is generally the case that such applicants -- the State of California, for example (or either of the two other appellants) in the Cascade case, supra, -- could not have instituted the original action. But they have, or claim, an interest in the "property or transaction" out of which a judicial remedy is to be fashioned. And applicants here claim, and are entitled to claim, precisely such an interest.

CONCLUSION

For the reasons set forth above, the decision of the District Court denying Applicants' motion to intervene should be reversed, and the case remanded with directions that intervention be allowed to Applicants and/or to others similarly situated, upon proper motion or renewal of motion therefor.

Respectfully submitted,

BURTON H. HALL
Attorney for Applicants to
Intervene-Appellants



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GEORGE RIOS, ET AL., Plaintiffs-Appellees,

-and-

JOHN GUNTHER, et al., etc., Applicants to
Intervene-Appellants,

-against-

ENTERPRISE ASSOCIATION, etc., et al.,
Defendants-Appellees.

74-2107

UNITED STATES OF AMERICA, etc.,
Plaintiff-Appellee,

-and-

JOHN GUNTHER, et al., etc., Applicants to
Intervene-Appellants,

-against-

ENTERPRISE ASSOCIATION, etc., et al.,
Defendants-Appellees.

AFFIRMATION OF SERVICE

BURTON H. HALL, an attorney duly admitted to practice before this Court, hereby affirms that he is attorney for Applicants to Intervene-Appellants herein; that on November 21, 1974, he served one copy of the Joint Appendix herein and two copies of Appellants' brief herein upon each of the following, at the addresses indicated:

DENNIS R. YEAGER, ESQ., 418 West 118th Street,
New York, NY., 10027
DELSON & GORDON, ESQS., 230 Park Avenue, New York
New York, 10017; and
BREED, ABBOTT & MORGAN, ESQS., 1 Chase Manhattan
Plaza, New York, N.Y.,

by depositing the same, post paid and properly addressed, in a branch post office maintained by the United States Postal Service; that the persons so indicated are counsel for the plaintiffs-appellees and defendants-appellees (not including the United States) in the within action, and the addresses so indicated are the addresses designated by said attorneys for that purpose; and that on November 22, 1974, your deponent personally served a copy of the Joint Appendix and two copies of Appellants' brief herein upon PAUL J. CURRAN, United States Attorney, United States Court House, Foley Square, New York, New York, by delivering the same and leaving same with a person in charge of his office.



BURTON H. HALL

NOTICE OF ENTRY

Sir:- Please take notice that the within is a (certified) true copy of a duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

Attorney for

Office and Post Office Address

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:- Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19

at M.

Dated,

Yours, etc.,

Attorney for

Office and Post Office Address

To

Attorney(s) for

UNITED STATES COURT OF APPEAL
FOR THE SECOND CIRCUIT
Index No. Year 19

74-2107

GEORGE RIOS, et al., Plaintiffs-App
-and-
JOHN GUNTHER, et al., etc. Applicants to Inter.-App
-against-
ENTERPRISE ASSOCIATION, et Defendants-Appellees

UNITED STATES OF AMERICA Plaintiff-App

and same parties

AFFIRMATION OF SERVICE

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To

Attorney(s) for

Service of a copy of the within

is hereby admitted
Dated,

Attorney(s) for

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